

**CHONG YOONG CHOY**

a

v.

**UOL FACTORING SDN. BHD.**

COURT OF APPEAL, KUALA LUMPUR

b

TUAN GOPAL SRI RAM JCA

DATO' SITI NORMA YAAKOB JCA

DATO' AHMAD FAIRUZ SHEIKH ABDUL HALIM J

[TRADE APPEAL NO. W-02-183-95]

4 DECEMBER 1995

c

**CONTRACT:** *Factoring agreement - Liability of guarantor - Guarantor not a debtor but gave guarantee as surety and principle debtor - Extent of liability - Doctrine of estoppel - Applicability - Whether to be invoked to lend commercial efficacy to agreement - Consideration of Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.*

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This was an appeal against the decision of the High Court entering summary judgment against the appellant upon a guarantee which the appellant had executed in the respondent's favour. The facts were that a company known as Prebore Piling and Engineering Sdn. Bhd. (Prebore) was supplying goods and services on credit to Pembinaan Gunung Mewah Sdn. Bhd. (Gunung Mewah). Prebore entered into a factoring agreement with the respondent, and by that the latter agreed to factor the invoices as from time to time issued by Prebore to Gunung Mewah in respect of the goods and services supplied. In due course, a guarantee was executed by the appellant, in effect guaranteeing, both as surety and principal debtor, the due performance by Gunung Mewah of its obligations under the factoring agreement. Gunung Mewah defaulted and the respondent thus instituted proceedings against the appellant to recover the amount due.

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In the Court below, opposing the summons for judgment, the appellant raised the points, firstly, that the respondent's claim, made as it were under a building contract, was not in respect of payment for which the guarantee was executed, and secondly, that there was variation in the contractual relationship between Prebore and Gunung Mewah, such that the appellant was discharged from liability under the guarantee. The learned Judge found no merit in both contentions and accordingly granted summary judgment as aforesaid. Hence this appeal by the appellant.

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**Held:**

**Gopal Sri Ram JCA (delivering the judgment of the Court):**

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[1] The learned Judge was right in concluding that there was no merit in the contentions as advanced by the appellant.

- a* [2] The relevant documents showed that the respondent's claim falls squarely within the terms of the factoring agreement. It was wrong for the appellant to suggest that the invoices in respect of a building contract, including certificates of payment, could not be factored. As it is, any lawful debt may be factored, i.e. may be assigned, and the fact that the obligation to pay arises out of the building contract does not change the position. The appellant's first argument must therefore fail.
- b*

- c* [3] Under clause 1 of the guarantee, the appellant undertook the obligations of a principal debtor. In the event, it really does not matter what happened between the assignor (Prebore) and the debtor (Gunung Mewah). As far as the respondent is concerned, it entered into the factoring arrangement, encouraged, no doubt, by the appellant's promise to play the role of surety as well as principal debtor, thereby assuring the respondent that he would answer the debtor's default. Having so encouraged the respondent, it would be inequitable and unconscionable to now permit the appellant to assert that the promise he gave was unenforceable.
- d*

- e* [4] The doctrine of estoppel was invoked by the Federal Court in *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 4 CLJ 283; [1995] 3 MLJ 331 to lend efficacy to a factoring agreement. The facts here come within the broad purview of that doctrine and a different principle does not apply merely because the appellant is the guarantor of the debt and not the debtor himself. In the circumstances the trial Judge was correct in concluding that there were no triable issues in this case.

- f* [Appeal dismissed]

**[Bahasa Malaysia Translation of Headnotes]**

- g* **KONTRAK:** Perjanjian pemfaktoran - Tanggungan penggerenti - Penggerenti tidak merupakan penghutang tetapi telah memberikan gerenti sebagai penjamin dan penghutang utama - Had tanggungan - Doktrin estoppel - Pemakaian - Samada boleh digunakan bagi memberikan keberkesanan komersial kepada perjanjian - Pertimbangan *Boustead Trading (1985) Sdn. Bhd. lwn. Arab-Malaysian Merchant Bank Bhd.*

- h* Ini merupakan satu rayuan terhadap keputusan Mahkamah Tinggi yang memasukkan penghakiman terus terhadap perayu di atas satu gerenti yang telah disempurnakan oleh perayu atas nama responden. Fakta-faktanya adalah bahawa sebuah syarikat yang dikenali sebagai Prebore Piling & Engineering Sdn. Bhd. (Prebore) telah membekalkan barangan serta perkhidmatan secara kredit kepada Pembinaan Mewah Sdn. Bhd. (Gunung Mewah). Prebore telah memasuki satu perjanjian pemfaktoran dengan responden, dan melaluinya pihak yang terkemudian itu bersetuju untuk memfaktorkan invois-invois yang dikeluarkan dari masa ke masa oleh Prebore kepada Gunung Mewah berhubung
- i*

dengan barangan dan perkhidmatan yang dibekalkan. Berikutan itu, satu gerenti telah disempurnakan oleh perayu, pada hakikatnya menggerenti, sebagai penjamin dan juga penghutang utama, ke atas pelaksanaan oleh Gunung Mewah akan kewajipan-kewajipannya di bawah perjanjian pemfaktoran tersebut. Gunung Mewah telah memungkiri dan responden dengan itu telah memulakan prosiding terhadap perayu untuk mendapatkan semula jumlah yang kena dibayar.

*a**b*

Di Mahkamah di bawah, dalam membantah saman untuk penghakiman tersebut, perayu telah membangkitkan perkara-perkara, pertamanya, bahawa tuntutan responden, yang dibuat di bawah satu kontrak binaan, bukannya berhubung dengan pembayaran bagi yang mana gerenti tersebut telah disempurnakan dan keduanya, bahawa terdapat perubahan dalam perhubungan kontraktual antara Prebore dan Gunung Mewah, iaitu bahawa perayu telah dilepaskan daripada tanggungannya di bawah gerenti tersebut. Hakim yang bijaksana tidak mendapati apa-apa merit dalam kedua-dua penegasan tersebut dan berikutan itu telah memberikan penghakiman terus sepertimana yang tersebut di atas. Perayu dengan itu merayu.

*c**d*

**Diputuskan:**

**Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):**

[1] Hakim yang bijaksana adalah betul dalam memutuskan bahawa tidak terdapat merit dalam penegasan-penegasan sepertimana yang dikemukakan oleh perayu.

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[2] Dokumen-dokumen yang berkaitan menunjukkan bahawa tuntutan responden adalah dirangkumi oleh maksud terma-terma perjanjian pemfaktoran berkenaan. Perayu adalah silap apabila mencadangkan bahawa invoice-invoice berhubung dengan sesuatu kontrak binaan, termasuklah sijil-sijil pembayaran, tidak boleh difaktorkan. Kedudukannya ialah, segala hutang yang sah boleh difaktorkan, yakni boleh diserahkan, dan fakta bahawa tanggungan untuk membayar lahir dari satu kontrak binaan tidak menjejaskan kedudukan ini. Hujah perayu dengan itu semestinya gagal.

*f**g*

[3] Di bawah fasal 1 dokumen jaminan, perayu telah mengambil tanggungan sebagai penghutang utama. Oleh hal yang demikian, apa yang berlaku diantara pemberi serahhak (Prebore) dan penghutang (Gunung Mewah) adalah sebenarnya tidak material. Setakat ianya berkaitan dengan responden, ia hanya memeterai suatu perjanjian pemfaktoran, pemeteraian mana adalah didorong oleh janji perayu untuk memainkan peranan sebagai penjamin dan penghutang utama, di mana perayu dengan itu juga menyakinkan responden untuk bertanggungjawab atas segala kemungkiran penghutang. Setelah merangsang responden sedemikian rupa, adalah tidak adil dan tidak wajar untuk kini mengizinkan perayu untuk menegaskan bahawa janji yang diberinya itu tidak boleh di kuatkuasakan.

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- a* [4] Doktrin estoppel telah digunapakai oleh Mahkamah Persekutuan dalam *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283; [1995] 3 MLJ 331 untuk memberi keberkesanan kepada perjanjian pempfaktoran. Fakta-fakta disini umumnya adalah termasuk dalam lingkungan maksud doktrin tersebut, dan prinsip yang berbeza tidak boleh dipakai hanya kerana perayu adalah penjamin hutang dan bukan penghutang sendiri. Dalam hal sedemikian, Hakim perbicaraan adalah betul apabila merumus bahawa tiada berbangkit isu-isu yang patut dibicarakan dalam kes ini.

*[Rayuan ditolak]*

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**Cases referred to:**

*Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 4 CLJ 283, [1995] 3 MLJ 331 (*foli*)

*For the appellant - T.K. Lee; M/s. Tai King & Partners*

- d* *For the respondent - V.K. Natarajan (Michelle Ong with him); M/s. Kumar Jaspal Quah & Aishah*

## JUDGMENT

**Gopal Sri Ram JCA:**

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The appellant, the third defendant in the Court below, has appealed against the decision of Abdul Malek J (now JCA) entering summary judgment in the sum of RM1,077,697.28 against him as guarantor. The matter arose in this way.

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A company known as Prebore Piling and Engineering Sdn. Bhd. ("Prebore") agreed to supply goods and services on credit to another company, Pembinaan Gunung Mewah Sdn. Bhd. ("Gunung Mewah"). Prebore then approached the respondent in this appeal with a request to factor its bills to Gunung Mewah.

*g*

A factoring agreement was then entered into between Prebore and the respondent formalising the arrangement. The instant appellant and another person executed a guarantee in the respondent's favour, guaranteeing, both as surety and as principal debtor, the due performance by Gunung Mewah of its obligations under the factoring arrangement.

*h*

From time to time, Prebore invoiced Gunung Mewah for goods and services supplied and presented these invoices to the respondent for discounted payment. The respondent duly paid off the agreed percentage on the invoices to Prebore and claimed the full value of the same from Gunung Mewah. Upon the latter's default to make payment, the respondent instituted proceedings to recover the amount due. The appellant was, as earlier observed, the third defendant in those proceedings.

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The respondent, in due course, took out a summons for judgment. The learned Judge entered judgment for the sum claimed less RM220,000 which had been paid on 31 May 1994.

In the Court below, the appellant opposed the summons for judgment on a number of grounds. However, before us, Mr. T.K. Lee of Counsel who argued the appeal limited his criticism of the Judge's decision to two broad points. *a*

First, he submitted that what his client had guaranteed was due payment for goods and services supplied by Prebore to Gunung Mewah. However, his client was being called to meet a claim of quite a different nature, namely, one made under a building contract. *b*

Second, Counsel submitted that the contractual relationship between Prebore and Gunung Mewah had been varied and that his client was accordingly discharged from any further liability under the guarantee. *c*

The learned Judge examined the appellant's complaints with care and found no merit in any of them. We did likewise and came to the same conclusion as the learned Judge.

In the first place, the documents produced in the summary proceedings show that the respondent's claim falls squarely within the terms of the factoring agreement. It appeared that Counsel was suggesting that invoices in respect of a building contract, including certificates of payment could not be factored. We do not agree. Any lawful debt may be factored, that is to say, may be assigned, and we do not perceive that the position to be any different because the obligation to pay arises out of a building contract. Counsel's argument on the first ground therefore is without merit. *d*

The answer to Counsel's second argument is to be found in the very guarantee which his client executed. Under clause 1 of that document, the appellant expressly undertook the obligations of a principal debtor. So it really does not matter what happened between the assignor (Prebore) and the debtor (Gunung Mewah). As far as the respondent is concerned, it entered into the factoring arrangement, encouraged, no doubt, by the appellant's promise to play the role of surety as well as principal debtor, thereby assuring the respondent that he would answer the debtor's default. *e*

Ought the appellant, having so encouraged the respondent to act, be permitted now to assert that the promise he gave, and upon the strength of which the respondent acted, is unenforceable for any number of reasons? We believe that justice and conscience move for a negative response to that question. It would, in our judgment, be entirely inequitable and unconscionable to permit the appellant to pursue such a course. *f*

In *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 3 MLJ 331, the Federal Court dealt with the nature, purport and legal effect of factoring agreements. It is not necessary for us to repeat all that was said in that case. Suffice to say that that was a case in which the doctrine of estoppel was invoked to lend commercial efficacy to a factoring *g*

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*a* agreement. The facts of the present case also come within the broad purview of that doctrine, and we are of the view that a different principle does not apply merely because the appellant is the guarantor of the debt and not the debtor himself.

*b* The learned Judge was entirely correct in coming to the conclusion that there were no triable issues in this case. Indeed, we are of the same view.

For these reasons, the appeal was dismissed with costs.

Reported by W.A. Sharif

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